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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY LEE RAMDASS

Petitioner,

v.

RONALD J. ANGELONE,
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit
and on Application for a Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In a case where it is undisputed that the petitioner would have been ***eligible*** for parole on a life sentence as a matter of state law at the time the jury sentenced him to death, and where the petitioner does not contest the fact that Simmons v. South Carolina does not apply unless the prisoner was ***ineligible*** for parole, should certiorari be granted to decide whether the Fourth Circuit erred in ruling that it was not free to second-guess the Virginia Supreme Court's determination of a matter of state law?

2. In a case where it is undisputed that the trial court appointed an independent mental health expert to assist the petitioner during the penalty phase of trial and where it is equally undisputed that, as a matter of Virginia statutory law, ***every*** capital murder defendant has an absolute right to such appointment ***regardless of whether the prosecutor intends to prove future dangerousness or to present expert evidence on that issue***, should certiorari be granted to resolve a so-called conflict in the federal courts concerning the application of Ake v. Oklahoma to a situation that did not occur in Ramdass' case and cannot occur in Virginia?

3. Should this Court grant the application for a stay of execution simply to "hold" Ramdass' case for the decision in Terry Williams v. Taylor regarding the Fourth Circuit's interpretation of 28 U.S.C. § 2254 (d) even though, by Ramdass' own admission, the Fourth Circuit's application of § 2254 (d) to the Simmons and Ake claims was merely an alternative ruling?

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STATEMENT OF THE CASE

On January 28, 1993, a jury in the Circuit Court of Fairfax County, Virginia, found Ramdass guilty of the capital murder of Mohammed Kayani during the commission of robbery and of the illegal use of a firearm. Ramdass pleaded guilty to a charge of robbery. After a separate sentencing proceeding, the jury found that Ramdass represented a continuing serious threat to society and sentenced him to death for the capital murder. See Va. Code § 19.2-264.4. The jury also sentenced him to four years in prison for the firearm offense. After conducting the sentencing hearing required by § 19.2-264.5 on April 6, 1993, the court imposed the jury's sentences and also sentenced Ramdass to life in prison for the robbery.

The convictions and sentences unanimously were affirmed by the Virginia Supreme Court on November 5, 1993. Ramdass v. Commonwealth, 437 S.E.2d 566 (Va. 1993). This Court subsequently granted certiorari and remanded the case for reconsideration in light of its intervening decision in Simmons v. South Carolina, 512 U.S. 154 (1994). Ramdass v. Virginia, 512 U.S. 1217 (1994). On remand, the Virginia Supreme Court reaffirmed the trial court's judgment. Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994). (JA 202).[1] This Court denied certiorari review of the reaffirmance on April 24, 1995. Ramdass v. Virginia, 514 U.S. 1085 (1995).

On May 11, 1995, the trial court appointed counsel to represent Ramdass in a state habeas corpus proceeding. (JA 217). Pursuant to Ramdass' request, a second lawyer was appointed and Ramdass filed a petition for a writ of habeas corpus in the Virginia Supreme Court on August 30, 1995. On March 18, 1996, the Virginia Supreme Court dismissed the petition. (JA 283). Ramdass' petition for rehearing was denied on June 7, 1996. (JA 303).

On June 28, 1996, the trial court scheduled Ramdass' execution for August 21, 1996. (JA 304). On August 15, 1996, the United States District Court for the Eastern District of Virginia in Norfolk stayed Ramdass' execution. (JA 306). On September 11, 1996, the district court appointed three new lawyers to represent Ramdass. (JA 308).

Ramdass filed a § 2254 petition on February 14, 1997. On February 27, 1998, a Magistrate Judge issued a report and recommendation that all but one of Ramdass' claims be dismissed. (JA 700). The Magistrate Judge recommended that Ramdass' death sentence be vacated on the basis of an alleged Simmons error. (JA 804). On August 14, 1998, the district court granted relief on the Simmons claim and "remanded" the case to the state trial court for resentencing. (JA 869). Ramdass v. Angelone, 28 F. Supp.2d 343 (E.D. Va. 1998).

The respondent appealed to the United States Court of Appeals for the Fourth Circuit. On August 3, 1999, a three-judge panel of the Fourth Circuit reversed the district court. Ramdass v. Angelone, 187 F.2d 396 (4th Cir. 1999). One member of the panel, Judge Murnaghan, dissented.

On September 17, 1999, Ramdass' petition for rehearing and rehearing *in banc* was denied.[2] Judge Murnaghan voted to grant panel rehearing. A "member" of the Court requested a poll on the petition for rehearing *in banc*. Judge Murnaghan and three other judges[3] voted to hear the case *in banc*. Nine judges voted to deny rehearing. On September 28, 1999, the Fourth Circuit denied Ramdass' motion to stay the mandate and the mandate issued on October 6, 1999.

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[1] References to the appendix filed below will be indicated by "(JA ___)." A copy of the appendix has been lodged with this Court.

[2] Copies of the rehearing papers have been lodged with this Court.

[3] The three other judges were Judge Ervin (now deceased), Judge Michael and Judge Motz.

On October 22, 1999, the Circuit Court of Fairfax set Ramdass' execution for November 23, 1999, pursuant to Virginia Code § 53.1-232.1. On November 5, 1999, the Fourth Circuit denied Ramdass' motion to recall its mandate and to stay the execution.

STATEMENT OF THE FACTS

I. *The Crimes*

It is undisputed that Ramdass is the person who murdered Mohammed Kayani by shooting him in the head at point-blank range. The Virginia Supreme Court found the facts surrounding Ramdass' capital offense to be as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7-Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7-Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7-Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f---------- head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.
>
> When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?" After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."
>
> Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass, 437 S.E.2d at 568-569. See 28 U.S.C. § 2254(e)(1) (state court findings of fact must be presumed correct and presumption may be overcome only by clear and convincing evidence); Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's rendition of historical facts).

With respect to the overwhelming evidence warranting the death penalty, the Virginia Supreme Court found as follows:

> The record in this case shows that Ramdass, who was born October 19, 1971, has been involved in criminal activity since he was 14 years old.
>
> His first violent offense was that of "purse snatch[ing]" from an elderly woman in 1985. During the time Ramdass was on probation for that offense, he began to sell illegal drugs. Soon after, he was involved in the unauthorized use of a moped and in the statutory burglary of a dwelling with the intent to commit larceny. As a result, Ramdass was committed to state juvenile facilities in January of 1986 and was paroled in September of that year. Within three

months of that release, Ramdass had violated his parole and was recommitted. He remained in custody until November of 1987, when he was released for a 30-day home visit. Ramdass was classified as an escapee when he failed to return to the state juvenile facility at the end of his home visit.

On February 20, 1988, Ramdass robbed Frederick Thompson. When the police arrested Ramdass for that offense, he was sleeping with a loaded revolver on his bedside table. Ramdass, treated as an adult for that offense, pled guilty and was sentenced to a term of seven years in the penitentiary. Ramdass was released on mandatory parole in May of 1992.

Within three months of that release, while still on parole, Ramdass again acquired a gun. Shortly thereafter, he committed six armed robberies, some accompanied by physical violence to the victims.

The first two robberies occurred on August 25, 1992, when Ramdass abducted Robina Khan, robbed Mark Hasfiz, and robbed and struck Richard Imlow in a Pizza Hut in Fairfax County. Ramdass's third robbery was that of Christopher Allen Crissel, a clerk at Bragg Towers, an apartment-hotel in Alexandria, on August 29. Crissel testified that Ramdass struck Crissel in the jaw "as hard as he could, with a lot of impact [and] said 'Give me the f_____ money or I'll blow your head off.'" After Crissel gave Ramdass over $500 from a desk drawer, Ramdass hit the back of Crissel's head with his gun "as hard as he could."

> Ramdass committed his fourth and fifth robberies on the same day. On August 30 at about 6:00 p.m., Ramdass robbed Emmanuel Gilbert Selassie and shot him in the head at close range. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Then, on September 2, in the present case, Ramdass robbed Kayani in Ramdass's sixth robbery in eight days; he also shot Kayani in the head at close range and caused his death.
>
> Finally, our review of the record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Ramdass, 437 S.E.2d at 574.

II. *The Simmons Claim*

The Fourth Circuit recounted the relevant facts as follows:

> At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society" -- the "future dangerousness" predicate for imposition of the death penalty. *See* Va. Code Ann. 19.2-264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."
>
> During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern themselves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three strikes provision. n1 *See* Va. Code Ann. 53.1-151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

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n1 Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is ineligible for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va. Code Ann. 53.1-151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18-year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks after the jury in this case concluded its sentencing deliberations.

Ramdass, 187 F.3d at 400.

On appeal to the Virginia Supreme Court, Ramdass claimed, among other things, that error had occurred when the trial court gave the model jury instruction regarding parole eligibility. (JA 167). The Virginia Supreme Court affirmed Ramdass' sentence on November 5, 1993. On the parole eligibility issue, the Court ruled that, under long-standing precedent, the trial court correctly had answered the jury's question regarding parole eligibility. Ramdass, 437 S.E.2d at 573.

Simmons v. South Carolina was not argued in this Court until January 18, 1994. Simmons, 512 U.S. at 154. Ramdass filed his certiorari petition in this Court in February, 1994, arguing, among other things, that the trial court had erred in its response to the jury's question regarding parole. This Court decided Simmons on June 17, 1994. On June 20, 1994, the Court granted Ramdass' certiorari petition and remanded the case to the Virginia Supreme Court for reconsideration in light of Simmons. Ramdass v. Virginia, 512 U.S. 1217 (1994).

On remand in the Virginia Supreme Court, Ramdass argued that Simmons required vacatur of his sentence. He alleged in conclusory fashion that he was ineligible for parole. (JA 184-185). The Commonwealth argued in response that, at the time the jury was considering what sentence to recommend, Ramdass could not have been rendered parole-ineligible by a life sentence on the capital crime because he had at that time only one of the three necessary qualifying convictions under Virginia Code § 53.1-151(B1).[4] (JA 193-195).

Ramdass made no reply to the Commonwealth's argument, even though the Virginia Supreme Court's briefing order expressly permitted him to do so. (JA 182). In its opinion reaffirming Ramdass' sentence, the Virginia Supreme Court held as follows:

> In Simmons, the Supreme Court held that when "future dangerousness" is an issue in the sentencing phase of a capital murder case, the jury is entitled to information concerning the defendant's parole *ineligibility*. Simmons, 512 U.S. at ___, 114 S.Ct.

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[4] As the Fourth Circuit observed, § 53.1-151(B1) required that, before a convicted felon could be classified as parole-ineligible, he must have been convicted of three offenses of murder, rape or robbery with a deadly weapon, and further that the three or more offenses must not have occurred as part of a common act, transaction or scheme. At the time the capital jury was considering his sentence, Ramdass had been convicted of three robberies, but one involved no deadly weapon and the other two occurred during the same restaurant robbery and, thus, clearly were part of a common act, transaction or scheme. Ramdass also had been tried and found guilty of the Domino's Pizza robbery in Alexandria, but the trial court in that case did not enter judgment on the jury's verdict until after Ramdass' capital jury had sentenced him. Thus, under Virginia law, that guilty verdict could not have been counted as a qualifying "conviction" under § 53.1-151 at the time Ramdass' capital jury inquired about his potential parole status.

at 2198. Hence, Simmons applies only if Ramdass was ineligible for parole when the jury was considering his sentence.

Code § 53.1-151(B) establishes a person's ineligibility for parole as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

At the time that the jury was considering Ramdass' penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B)(1). They were:

(1) Ramdass' January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B)(1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B)(1).

> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B)(1). See Smith v. Commonwealth, 134 Va. 589, 592-593, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered no conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the Simmons decision does not affect his death sentence. Therefore, we will reaffirm the trial court's judgment, and reinstate the defendant's conviction and sentence to death.

(JA 202-204).

Ramdass did not petition the Virginia Supreme Court for rehearing. He petitioned this Court for certiorari review, however, and argued for the first time that the Virginia Supreme Court improperly had found him eligible for parole under state law. (JA 207). This Court denied certiorari on April 24, 1995. Ramdass v. Virginia, 514 U.S. 1085 (1995).

Ramdass repeated his generalized direct appeal Simmons claim during his state habeas corpus proceeding. He did not challenge the Virginia Supreme Court's finding of parole eligibility. (JA 251-253). The Virginia Supreme Court refused to relitigate the matter under its rule in Hawks v. Cox, 175 S.E.2d 271 (Va. 1970). (JA 283, allegation C(13)). When Ramdass filed his § 2254 petition in the federal district court, however, he greatly expanded and changed the Simmons complaint that had been presented to the Virginia Supreme Court. He argued that: (1) under state law he allegedly was ineligible for parole; (2) the Virginia Supreme Court had no authority to determine parole eligibility; (3) the Virginia Supreme Court's decision was internally inconsistent; (4) the Virginia Supreme Court ignored a decision of the Virginia Court of Appeals; (5) the Virginia Supreme Court's decision was at odds with the parole statute; (6) even if the finding of eligibility was correct, the Simmons instruction still should have been given; (7) the refusal to give the instruction violated the Eighth Amendment; (8) he was entitled to the instruction as a matter of mitigating evidence; (9) the trial judge ignored Ramdass' parole ineligibility in imposing the death sentence; and (10) the Virginia Supreme Court was required under Virginia Code § 17-110.1 to consider his parole ineligibility. (JA 315-344).

Despite the respondent's assertion that the bulk of Ramdass' Simmons complaint was barred from review in federal court because it never had been presented to the Virginia Supreme Court (JA 514-515), the Magistrate Judge ruled that it had been preserved in its entirety. (JA 732-733, 795-796). The Magistrate Judge then gratuitously ruled that Simmons was not a "new

rule" (JA 793, 797-804),[5] and went on to hold that: the Virginia Supreme Court's eligibility finding was "puzzling" (JA 805); the Virginia Supreme Court had misinterpreted Virginia law (JA 807-810); and, in any event, Simmons was not limited to "the very narrow issue of specific parole eligibility or lack thereof." (JA 811). The Magistrate Judge thus found the Virginia Supreme Court's decision unreasonable under § 2254(d) and recommended vacatur of sentence. (JA 812).

The District Judge found that two of Ramdass' Simmons arguments never had been presented to the Virginia Supreme Court and, therefore, were barred from review: the contention that the Virginia Supreme Court had no authority to determine parole eligibility and the contention that the Virginia Supreme Court's parole finding was arbitrary. (JA 835). The District Judge, however, agreed with the Magistrate Judge's other conclusions: that Simmons was but one of "a series of cases incrementally refining the process of applying the death penalty" and that its "theme" was encompassed in prior cases from this Court requiring the admission of ***mitigating evidence*** under the Eighth Amendment as well as those dealing with the Fourteenth Amendment's due process right to present rebuttal evidence[6] (JA 850); that the Virginia Supreme Court's decision "limited the application of Simmons...in a manner inconsistent with the language in Simmons, required an inconsistent treatment of two separate convictions of Petitioner, and ***contradicted more than one hundred years of Virginia law*** that

[5] In 1997, ***a year before*** the Magistrate Judge ruled in Ramdass' case, this Court had held that the rule in Simmons v. South Carolina was "new" and therefore inapplicable on federal collateral review to cases which were final before Simmons was decided. O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969 (1997). Ramdass' case obviously was not final before Simmons was decided and the respondent never has argued that the Simmons claim ***raised on direct appeal*** was barred by the new rule doctrine.

[6] In Simmons, this Court ***expressly*** left open the question of whether the rule it had announced was required by the Eighth Amendment. 512 U.S. at 162 n.4.

says a conviction occurs when the jury renders the verdict" (JA 849, emphasis added); and, finally, that the Virginia Supreme Court unreasonably had applied Simmons "[e]ven assuming the definition of 'conviction' was properly determined by the Virginia Supreme Court," because "the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole." (JA 858). In the opinion of the district court, the "jury could have been informed, with all confidence, that Petitioner would never be released from prison...." (Id.). The district court "remanded" Ramdass' case to the Circuit Court of Fairfax County for re-sentencing. (JA 869).

On appeal, the Fourth Circuit held that the district court had erred. It held first that Simmons requires a determination of whether the defendant is eligible for parole and that that determination is a matter of state law, rather than a federal issue defined, as Ramdass asserted, by a "nonlegalistic 'commonsense impossibility of parole.'" Ramdass, 187 F.3d at 405. Second, the Court held that Ramdass' nebulous standard for determining parole was contrary to Fourth Circuit precedent. Id. at 406. Third, it held that, as a matter of logic, ***any*** determination of a state prisoner's parole eligibility status has no meaning beyond what state law determines. Id. Fourth, the Court held that Ramdass' proposed "standard" was not "clearly established" under § 2254 (d)(1), and also ran afoul of the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989), because it asked for an extension of what Simmons requires. Id. Finally, the Fourth Circuit held that Ramdass' "insinuation" that the Virginia Supreme Court had "acted craftily in denying his Simmons claim" was completely unfounded: the Virginia rule that a conviction does not count for parole eligibility purposes until a final sentencing order has been entered comports with the "age-old rationale" that, before negative consequences (such as parole ineligibility) may be imposed based upon a conviction, a defendant is accorded added protection by a definition of

"conviction" that limits it to orders which actually have been entered. In Ramdass' case, the Fourth Circuit accurately observed that the random order in which his trials and sentencing proceedings had taken place was entirely foreseeable, given the fact that he had committed so many felonies in such a short period of time. Id. at 407.

In his petition for rehearing to the Fourth Circuit, Ramdass for the first time expressly abandoned his primary contention throughout the federal proceedings: that the Virginia Supreme Court's determination of his parole eligibility at the time of sentencing was wrong as a matter of state law. (Pet. Rehrg. at 3, n.2). Instead, he argued that Simmons should be ***extended*** to his case because it supposedly was "close" to Simmons, an implicit admission that it was not "controlled" by Simmons. (Pet. Rehrg. at 5). The Fourth Circuit, however, rejected his invitation to create a new rule, and denied the petition for rehearing.

III. *The Ake Claim*

Before trial, the Fairfax Circuit Court appointed Dr. Samenow, an expert in forensic psychology, to assist Ramdass with sentencing issues pursuant to Virginia Code § 19.2-264.3:1. The trial judge appointed Dr. Samenow because he "calls it like it is, whether it is in favor of the Commonwealth or the defendant or either one." (JA 28). The prosecutor noted on the record that Dr. Samenow had testified for other defendants. (JA 28-29).[7] During the sentencing phase of trial, neither the prosecution nor the defense presented any expert witnesses.

Ramdass made no complaint about the appointment of Dr. Samenow at trial or on direct

[7] Another Virginia death-row inmate since executed, Dwayne Wright, expressly had asked for Dr. Samenow at trial because he was so highly qualified. (JA 527). Dr. Samenow testified on behalf of Wright at trial and presented extensive information that was favorable to that defendant. (JA 550-616). Dr. Samenow also was appointed and testified for Calvin Swann, another Virginia death-row inmate. See Swann v. Taylor, 119 S.Ct. 1591 (1999) (cert. denied) (BIO 96-8686 at p. 17-19).

appeal. In his state habeas petition, Ramdass claimed that his trial counsel had been ineffective for allegedly failing to object to the appointment of Dr. Samenow. (JA 229). The Virginia Supreme Court denied the claim of ineffective assistance for lack of merit.

In his federal habeas petition, Ramdass claimed that the appointment of Dr. Samenow violated Ake v. Oklahoma, 470 U.S. 68 (1985). (JA 345-356). The district court found the claim procedurally barred because it had not been presented in state court. (JA 836-837). Ramdass also claimed that trial counsel had performed ineffectively because they did not object to the so-called "pro-prosecution" stance of Dr. Samenow. The district court assumed for the sake of argument that counsel performed deficiently under Strickland v. Washington, 466 U.S. 668 (1984), but denied the claim because the petitioner could not show the requisite prejudice. Ramdass, 28 F. Supp. 2d at 370.

On appeal in the Fourth Circuit, Ramdass quoted from Dr. Samenow's report in his opening brief and filed a motion to supplement the record to include the report because, as he admitted, the report never had been presented to the district court or made a part of the record below. (Respondent's Appendix 1).[8] The Fourth Circuit denied Ramdass' motion to supplement the record. (Respondent's Appendix 7).

With respect to the claim of Ake error, the Fourth Circuit held that "[e]ven though the claim appeared [in the state habeas petition] ***under the heading of ineffective assistance of counsel*** and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on [Ake]" and thus had preserved the substantive claim of Ake error for federal court review. Ramdass, 187 F.3d at 409 (emphasis added). The Fourth Circuit rejected the claim of error, however, as follows:

[8] Needless to say, the report also never has been presented to any state court.

> Ake provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. See Ake, 470 U.S. at 82-83 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when the State presents psychiatric evidence of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

Ramdass, 187 F.3d at 409.

The Fourth Circuit further rejected the related claim of ineffective assistance as follows:

> Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither Ake, 470 U.S. at 83, nor Virginia Code § 19.2-264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by Strickland, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

Id. at 410.

In his petition for a writ of certiorari, Ramdass quotes from, and relies upon, the report prepared at the time of trial by Dr. Samenow. (Pet. at 10). Ramdass also has lodged a copy of the report with this Court along with a cover letter informing the Court of the lodging. (Respondent's Appendix 9). ***In neither his petition for a writ of certiorari nor in his letter covering his lodging of the report does Ramdass make any mention, or inform the Court in any manner, of the ruling by the Fourth Circuit that Dr. Samenow's report - which never was presented to any state court or any lower federal court – is not part of the record in this case.***

REASONS WHY THE WRIT AND APPLICATION FOR A STAY OF EXECUTION SHOULD BE DENIED

I. *The Fourth Circuit Properly Determined that Ramdass Is Asking For An Extension Of Existing Law And Therefore That The Requested Relief Is Not Available On Collateral Review.*

Ramdass opens his argument with the remarkably incorrect contention that "[t]here has never been disagreement as to the practical reality of Ramdass' situation: If he was sentenced to life imprisonment, he was never going to have the opportunity to be considered for release on parole. No state or federal court judge has questioned that immutable fact." (Pet. Cert. at 17). However, as the opinions of the Virginia Supreme Court and Fourth Circuit clearly show, exactly the opposite to Ramdass' contention is true: it has been determined conclusively as a matter of state law that a sentence of life imprisonment in the capital murder case would ***not*** have rendered him ineligible for parole.[9]

Indeed, recognizing that relief under Simmons otherwise was not available to him, Ramdass asserted throughout the years of post-conviction litigation that he was in fact ***ineligible*** for parole at the time the jury was considering his sentence. He made this assertion the centerpiece of his Simmons challenge in the Virginia Supreme Court on remand from this Court on direct appeal, in this Court on certiorari review of that remand decision, in the Virginia Supreme Court on habeas review, in the district court on federal habeas review and in the Fourth

[9] Even more puzzling is Ramdass' completely incorrect statement that "even the Fourth Circuit acknowledged [that] everyone except the jury knew that the only alternative sentence to death was life without the possibility of parole." (Pet. Cert. at 26). Ramdass cites to no part of the Fourth Circuit's decision for this assertion as, indeed, no such statement was made by the Court of Appeals. The Fourth Circuit steadfastly held that Ramdass was eligible for parole at the time of his capital sentencing because the Virginia Supreme Court had so determined as a matter of state law.

Circuit on appeal. He also argued specifically in the federal courts that the Virginia Supreme Court had erred in its determination that, under Virginia law, he was not ineligible for parole.[10]

Then, ***for the first time in the case***, in his petition for rehearing in the Fourth Circuit, Ramdass ***expressly abandoned*** his challenge to the Virginia Supreme Court's eligibility determination. (Pet. Rehrg. at 3, n.2). Instead, Ramdass argued, as he now does, that, despite his uncontested status as a ***parole-eligible*** defendant at the time his jury was deciding sentence, he nevertheless was entitled to a no-parole instruction under his novel "functional reality of parole ineligibility" test. (Pet. Cert. at 17).[11] According to Ramdass, although he was "technically" eligible for parole, he was "functionally" ineligible and, therefore, entitled to a Simmons no-parole instruction. Just exactly what "functionally ineligible for parole" means, however, is anything but clear under Ramdass' theory, except, of course, to say that ***he*** qualified under that amorphous test.

Ramdass' current claim must be regarded as a request that this Court ***extend*** the holding in Simmons to cover the unique facts of his case alone: he was parole-eligible at the time of his capital sentencing, but, because it turned out that his ***subsequent*** convictions ***subsequently*** rendered him parole-ineligible, Simmons should be interpreted to apply to him. Certainly no precedent compelled a ruling in his favor at the time Ramdass' case became final, or even today. His claim thus is nothing less than a request for the creation of a new rule on collateral review

[10] Ramdass never contested this eligibility determination in state court. See Ramdass, 187 F.3d at 402.

[11] In the Court of Appeals, Ramdass asserted that parole eligibility must be determined based "on a nonlegalistic 'commonsense impossibility of parole.'" Ramdass, 187 F.3d at 405.

that is prohibited, as the Fourth Circuit properly found, by both the new rule doctrine and 28 U.S.C. § 2254 (d)(1).[12] Ramdass, 187 F.3d at 406.

Indeed, the argument Ramdass has constructed only demonstrates the novelty of his theory. Ramdass does not argue that Simmons or any cases interpreting Simmons compel a decision in his favor. Rather, he asks this Court to "grant certiorari to decide ***whether*** [the issue here] ***should be*** analyzed using a technical or a functional mode of analysis." (Pet. Cert. at 17, emphasis added). Clearly, whether a new formula for analysis ***should*** be employed is a question appropriately considered only in the context of direct review. It is expressly prohibited in the context of a case like Ramdass' that is on collateral review. See Gray v. Netherland, 518 U.S. 152, 166-169 (1996) ("habeas relief is appropriate only if 'a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'") (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

Ramdass asks this Court to employ a mode of analysis for parole-eligibility determinations completely divorced from state law on the matter. He says the Court should use the type of "reasonable person" test employed in determining whether a suspect is in custody under Miranda v. Arizona, 384 U.S. 436 (1966), or that used by federal courts deciding whether a prisoner is in custody under 28 U.S.C. § 2254, or the formula used to determine whether a defendant is entitled to the appointment of counsel, or the mode of analysis used by federal courts when deciding whether a state law violates a provision of the Constitution.

[12] 28 U.S.C. § 2254(d)(1) prohibits the granting of habeas relief on a claim rejected on its merits by the state court unless the state court adjudication was contrary to, or an unreasonable application of, "clearly established" federal law as determined by this Court.

The problem with these suggested tests – apart from their "new rule" implications – is that none of the circumstances has anything to do with the issue in Simmons. In Simmons, the information the defendant is entitled to impart to the jury is ***what his precise parole-eligibility status will be under state law if given a life sentence***. In the Miranda, federal habeas custody or right to counsel contexts, the determinations are not dependent in any manner on state law.

In Miranda, the rules are formulated to guide police officers with no legal background. In the federal habeas custody context, the rules guide federal judges by delineating the parameters of their jurisdiction. And, in the context of the right to counsel, the rules are formulated to guide the state courts in identifying the circumstances calling for the assistance of counsel. None of these examples of "functional reality" governs what instructions must be given to a jury, much less when a prisoner becomes ineligible for parole under state law.

Moreover, there is no issue in Ramdass' case, and Ramdass makes no argument, that Virginia's parole-eligibility statute or determination is unconstitutional. Thus, the tax, and other similar, cases he relies upon as examples of how a federal court assesses the "constitutional consequences" of a state statute simply have no connection to the question in Ramdass' case of whether a State's unchallenged and undeniably constitutional determination of parole-eligibility status may be redetermined by a federal court on collateral review.

Ramdass also argues that this Court used a "functional" test in Simmons because, according to Ramdass, Simmons was not really ineligible for parole. Ramdass goes to great lengths to prove that South Carolina supposedly contended that Simmons was eligible for parole, but his argument squarely is refuted by the opinion itself. In Simmons, not only had ***state officials testified*** that Simmons was in fact ***ineligible*** for parole under state law, but the ***State of South Carolina conceded this point at trial and never argued in this Court that he was eligible***

for parole. See Simmons, 512 U.S. at 158 (plurality opinion). Thus, the decisive distinguishing factor between Ramdass and Simmons is that here there is a ruling from the Virginia Supreme Court that, under Virginia law, Ramdass was ***eligible*** for parole at the time of his capital sentencing.

In his attempt to find similarity between his case and Simmons, Ramdass further contends that Virginia's position is like South Carolina's argument that a no-parole instruction should not have been given because Simmons may have been eligible for different forms of early release. But that is not what South Carolina argued in Simmons. To the contrary, it argued that, "***notwithstanding [Simmons'] parole ineligibility***, [Simmons] might receive holiday furloughs or ***other*** forms of early release" and thus the jury should not be misled to believe Simmons could not be released despite his parole-ineligibility status. Id. at 158 (emphasis added). This Court rejected South Carolina's reasoning because, unlike the other forms of ***possible*** release, Simmons' present parole-ineligibility was a ***certainty*** as a matter of state law, known at the time of sentencing, conceded by the State and thus a "legally accurate" factor the jury was entitled to consider when evaluating his future dangerousness. Id. at 166.

Virginia's position always has been simply that Ramdass' case does not fall within the ambit of Simmons because an ineligibility instruction in his case would not have been "legally accurate," a fact even Ramdass must concede unless the undefined, nebulous "functional reality" view of ineligibility prevails. While Simmons had been determined parole-ineligible under South Carolina law, Ramdass has been determined to have been parole-eligible under Virginia law at the time of his capital sentencing proceeding. The difference is dispositive.

Ramdass' complaint is one that ***any*** death-row inmate may make: odds are that he never would be released into society if given a life sentence, so he should have been able to instruct the

jury on those odds. Simmons, of course, imposes no such requirement and courts uniformly have rejected any extension of Simmons to similar situations. See, e.g., Roach v. Angelone, 176 F.3d 210, 220 (4th Cir.) (Simmons does not apply to defendant who would be eligible for parole after serving twenty-five years), cert. denied, 120 S.Ct. ___ (1999); Hughes v. Johnson, ___ F.3d ___, 1999 U.S. App. LEXIS 24842 at *22 (5th Cir. 1999) (same); Ingram v. Zant, 26 F.3d 1047, 1054 (11th Cir. 1994) (same); Burgess v. Georgia, 450 S.E.2d 680, 693 (Ga. 1994) (same).

Indeed, just to state the hypothetical instruction that would have had to have been given in Ramdass' case in order to convey accurate information to the jury – and Ramdass does not even attempt to articulate the instruction he believes he was entitled to - is to demonstrate how far removed Ramdass' case is from Simmons. If his claim had any merit, Ramdass' jury would have had to have been instructed as follows:

> You are instructed that the conviction in this case will count as the second out of three convictions necessary to make the defendant ineligible for parole under state law and that, therefore, a life sentence in this case will not render the defendant ineligible for parole.
>
> In a separate case, however, the defendant has been tried and found guilty of another offense upon which a judgment of conviction has not yet been entered. Under Virginia law, the court in that case may decide to set aside that guilty verdict or retry the case.
>
> If the court in that case decides to set aside or retry, the jury's verdict in that case would not render the defendant ineligible for parole if you elect to fix punishment at life. However, if the court in that case decides to enter a judgment of conviction upon the jury's verdict, it would count as a third conviction making the defendant ineligible for parole if you elect to fix punishment at life.
>
> It is unknown when the court in that other case will make its decision.

Certainly, Simmons does not require such an instruction. The plurality opinion plainly stated that "where ... ***state law*** prohibits the defendant's release on parole, due process requires that the

sentencing jury be informed that the defendant is parole ineligible." Simmons, 512 U.S. at 156 (emphasis added). Justice O'Connor's concurring opinion plainly stated that a no-parole instruction was required "in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole ...." Id. at 177. Thus, under Simmons, Ramdass simply was not entitled to a no-parole instruction because a life sentence would not have rendered him ineligible for parole.

Ramdass, moreover, is wrong when he argues that, under Virginia Supreme Court Rule 3A:15, the Alexandria Circuit Court had no choice but to enter judgment on the Domino's Pizza robbery verdict and that that conviction therefore was a certainty. (Pet. Cert. at 8, n.4). First, his argument is foreclosed by the Rule itself which vests a Virginia trial court with absolute authority either to enter a judgment of acquittal or to grant a new trial up to twenty-one days after a final order has been entered. (Pet. App. at 67). Indeed, Ramdass admits this undeniable fact. (Pet. Cert. at 8, n.4).

Ramdass states, however, that the fact that the Rule also could have resulted in a setting aside of the judgment in the capital murder case and yet the Virginia Supreme Court still counted that judgment as a "conviction" under § 53.1-151, the parole statute, somehow shows that the Virginia Supreme Court rejected a "hypothetical possibility of release" under the Rule. (Id.). This convoluted logic is completely unfounded: the question decided by the Virginia Supreme Court was not whether a trial, or any, court has the authority to set aside a guilty verdict before entry of final judgment but only whether a final judgment had in fact been entered so as to trigger the parole statute at all. The Dominos Pizza guilty verdict had not been imposed by the trial court and thus, under Virginia law, could not count as a "conviction."

Second, Ramdass' "Rule 3A:15" argument is nothing more than an attempt to second guess the Virginia Supreme Court on a matter of pure state law. The federal courts, however, are not free to redecide matters of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Engle v. Isaac, 456 U.S. 107, 119 (1982).

What Ramdass is left with is an argument that, although the Virginia Supreme Court was fully authorized to interpret its own parole statute and to find that Ramdass was not ineligible for parole at the time his capital jury was considering sentence, this Court should grant certiorari to decide whether the federal court may find that he was ineligible for parole under a "functional reality" test that is not tied to any state law defining when a person becomes ineligible for parole.[13] Ramdass seeks relief for himself alone through a reinterpretation of Simmons and of federal law governing collateral review that has no support in either this, or any lower, Court's cases. His claim, therefore, presents no "compelling" reason to grant certiorari because the Fourth Circuit's decision is simply a straightforward application of this Court's precedents which will have no impact beyond the parameters of Ramdass' case. See U.S. Sup. Ct. R. 10.

II. *The Fourth Circuit's Rejection Of Ramdass' "Ineffective Psychologist" Claim Does Not Conflict With Ake v. Oklahoma Or With Other Circuits.*

It is undisputed that the trial court appointed an independent mental health expert to assist Ramdass with sentencing issues, that the trial court considered Dr. Samenow eminently qualified and that Dr. Samenow had testified on behalf of other capital defendants, including at least one

[13] The Fourth Circuit certainly was correct when it recognized that, "as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law." Ramdass, 187 F.3d at 406.

who requested his appointment. It also is undisputed that Ramdass made no complaint about Dr. Samenow's appointment until his state habeas lawyers faulted his trial lawyers for not objecting to Dr. Samenow, that Ramdass made no separate claim under Ake v. Oklahoma about Dr. Samenow until he filed his federal habeas petition and that the Fourth Circuit denied Ramdass' motion to supplement the record with Dr. Samenow's report because Ramdass had not offered the report to any state or lower federal court for review.

Ramdass now argues that certiorari should be granted in order to resolve a conflict between the circuits about what showing a defendant must make before a State is required to appoint an independent mental health expert. It is important to understand, however, that Ramdass does not claim that the trial court denied his motion for the appointment of an expert or that the expert appointed was not independent. Rather, Ramdass claims that, because his expert did not give him a favorable report for mitigation purposes, he was entitled to a different expert who would testify favorably. Certiorari should not be granted because Ramdass' claim was not properly preserved below, because it is barred by the "new rule" doctrine, because any conflict among the circuits over what Ake requires before an expert must be appointed is irrelevant to the Fourth Circuit's decision and because Ramdass' claim is not even governed by Ake at all.

A. The claim was not properly preserved.

It is elemental that a habeas petitioner must have presented his claim to the state court before a federal court may consider it on collateral review. See Gray, 518 U.S. at 163. Indeed, a habeas petitioner does not meet this requirement simply by making the claim in state court under one constitutional theory and then raising the same claim in federal court under a different constitutional theory. See Duncan v. Henry, 513 U.S. 364 (1995). Ramdass did not make his Ake claim until he filed in federal court. As the Fourth Circuit found, in the state habeas

petition, "the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert." Ramdass, 187 F.3d at 409. The claim was presented to the state court, then, as one of ineffective assistance yet presented to the federal court as a due process violation. Under Duncan, therefore, Ramdass failed properly to preserve his Ake due process claim for federal court review and it is thus not appropriate for certiorari review.

B. The claim is not controlled by Ake and thus is barred by the "new rule" doctrine.

In Ake v. Oklahoma, the issue was whether and when a State had a due process obligation to provide an indigent capital defendant with the services of a mental health expert. Ake in no way dealt with the issue of whether there is a cognizable constitutional claim of "ineffective assistance" of mental health expert, the precise claim that Ramdass has raised in his federal petition. Indeed, Ake not only did not address the quality of the mental health expert's performance, but it expressly held that a defendant has ***no right to choose a particular expert***. See Ake, 470 U.S. at 83. Ake, therefore, simply does not govern Ramdass' complaint.

Thus, to the extent Ramdass relies on Ake for relief, his claim undoubtedly is barred by the "new rule" doctrine. This Court has refused to extend the Strickland-type inquiry regarding effective assistance of trial counsel to claims of ineffective assistance of habeas counsel. See Coleman v. Thompson, 501 U.S. 722, 752 (1991). The Court never has suggested that there exists an even more remote right to the "effective assistance" of a mental health expert. Clearly, such a novel question, if ever addressed, must be tackled on direct review. There is no existing authority compelling acceptance of such a claim. Thus the claim is barred from review in federal collateral proceedings by the "new rule" doctrine. See Gray, 518 U.S. at 169.

C. Ramdass' "conflict" argument is groundless.

Ramdass argues that cases from five other circuits demonstrate a conflict over the application of Ake. His contention goes as follows: the Fourth Circuit held that there is no right to an expert in sentencing under Ake unless the defendant's mental health is at issue or the prosecutor himself uses an expert to prove future dangerousness, but the Tenth, Eleventh, Eighth, Ninth and Sixth Circuits have held that Ake applies even when the prosecutor does not use an expert. In his dissenting and concurring opinion below, Judge Murnaghan rejected Ramdass' Ake claim because "Ake's application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court" and thus is barred by § 2254(d)(1). Ramdass, 187 F.3d at 411. Under either § 2254(d)(1) or the "new rule" doctrine, Judge Murnaghan undoubtedly was correct. If, in fact, the circuits are in conflict over what Ake requires before the State must appoint an expert, then the issue is *per se* barred by the new rule doctrine in this collateral case because it is a paradigmatic example of an issue that is "susceptible to debate among reasonable minds." See O'Dell, 521 U.S. at 159, quoting Butler v. McKellar, 494 U.S. 407, 415 (1990). Thus, if the issue is to be resolved, it must be decided on direct review and not in this collateral case.

The most glaring problem with Ramdass' "conflict" argument, however, and the reason it really has no effect whatsoever on Ramdass' case, is twofold: first, Ramdass never even presented his Ake complaint about Dr. Samenow to the state court except by way of a claim of ineffective assistance of trial counsel. Ramdass' default only highlights the unfairness to the state courts of considering a claim that was found barred by the federal district court and that only the federal court of appeals reached.

Second, the "conflict" is over when a state court must appoint an expert, a completely moot point in Ramdass', or any Virginia, case. Virginia Code § 19.2-264.3:1 guarantees to all capital defendants - simply for the asking - what the federal courts of appeals supposedly are in conflict over. Ramdass received the benefit of Virginia's extra-constitutional provision. Thus, even if there is a conflict in the federal courts over when Ake requires appointment of an expert, the resolution of that conflict can have absolutely no impact in Ramdass' case. He already received what Ake requires, under ***any*** circuit's interpretation.

Finally, the cases themselves do not demonstrate a conflict with Ramdass' case. First, in Terry v. Rees, 985 F.2d 283 (6th Cir. 1993), the court of appeals held that Ake required the appointment of a ***pathologist***, the denial of which appointment was found to be harmless error. Obviously, that decision is irrelevant to the issues in Ramdass' case and, if anything, is in conflict with this Court's "new rule" doctrine.

Second, of the four remaining cases, three were cases in which the state trial courts had ***denied the defendants' motions for appointment of any independent mental health expert***. See Moore v. Reynolds, 153 F.3d 1086, 1108-09 (10th Cir. 1998) (defendant made proper showing that mental state at issue but denial of expert was harmless), cert. denied, 119 S.Ct. 1266 (1999); Starr v. Lockhart, 23 F.3d 1280, 1290 n.8 (8th Cir.) (denial of independent expert in case error where defendant was retarded and where reasonable probability expert would aid defendant in sentencing), cert. denied, 513 U.S. 995 (1994); Smith v. McCormick, 914 F.2d 1153, 1157-59 (9th Cir. 1990) (trial court's own expert appointed for a competency exam did not fulfil Ake's requirement of an independent expert to assist the defense with sentencing issues), cert. denied, 504 U.S. 901 (1992).

The Tenth and Eighth Circuits in Moore and Starr do note in passing that, although Ake seems to limit the right to an expert to cases where the prosecutor uses one, they see no reason to so limit the right and thus will apply Ake whenever the defendant makes a showing that his mental state will be at issue. The Ninth Circuit in Smith simply does not address Ake's holding that a defendant is entitled to an expert when the prosecutor will be using an expert to prove future dangerousness. The most that these cases prove, however, is that there is a "debate among reasonable minds" over what Ake requires: a debate that, as shown above, only demonstrates the claim's "new rule" character and its irrelevance to Ramdass' case where an expert ***was*** appointed at his request.

In the last case, Clisby v. Jones, 960 F.2d 925, 928 (11th Cir. 1992), the *in banc* court of appeals reversed the district court's granting of habeas relief on the basis of Ake. The court of appeals noted that it did not believe Ake should be restricted to cases where the prosecutor had used expert testimony, found that the appointed expert's performance ***should be examined for competency*** and then found the expert competent. Id. As demonstrated above, such an extension of Ake represents a conflict not with Ramdass' case, but with this Court's "new rule" jurisprudence. (See above at subsection B).

D. Dr. Samenow was competent.

Ramdass never has presented any evidence that Dr. Samenow was or is incompetent under any standard. The record in this case demonstrates that Dr. Samenow was qualified to assist the defense with sentencing issues. He testified for other capital defendants (JA 28-29, 527, 550-616, see also Swann BIO 96-8686) and was appointed in Ramdass' case by a trial judge who believed he "calls it like it is, whether it is in favor of the Commonwealth or the defendant or either one." (JA 28). Indeed, that quality of objectivity no doubt was and is the genesis of

Ramdass' true complaint – that he did not have an expert of his own choosing to say what he wanted the expert to say. However, nothing in Ake or any other authority guarantees a particular result.

Moreover, although Ramdass has lodged with the Court the report Dr. Samenow prepared in preparation for trial, and although Ramdass has failed to inform this Court that the Fourth Circuit expressly denied his motion to supplement the record with this report because it never was presented to any state or lower federal court, the report does not support his claim of incompetence. In fact, the report is a twelve-paged, straightforward recitation of Ramdass' responses to Dr. Samenow's questions as well as an in-depth review of his troubled background and poor upbringing. On the first page of his report, Dr. Samenow recites the fact that he met with Ramdass three times for a total of six and three-quarter hours, that he administered a standard intelligence test, that he interviewed Ramdass' mother, that he reviewed the Virginia Code section charging him with assisting in the formulation of specified mitigating factors and that he reviewed nine prior evaluations performed on Ramdass.

Dr. Samenow recites that, when asked about his mother's report that he had exposed himself in elementary school, Ramdass said, "Everybody did it to girls – show 'em my dick." Ramdass never held a full-time job, lived on the streets, and, according to his mother, had a reputation as "ruthless." Ramdass told Dr. Samenow that he "always kept a gun" since childhood. (Report at 3).

His mother told Dr. Samenow that Ramdass was heavily involved in the selling of cocaine and PCP. Ramdass told Dr. Samenow he had made close to $20,000 selling drugs. His mother said he cursed at a judge who had sentenced him for breaking and entering at age twelve. (Report at 4).

Ramdass also told Dr. Samenow that he never obtained a driver's license and would throw away every ticket he received. He expressed his hatred for the police and admitted that he had escaped from the juvenile institutions in which he had been placed and had brutally assaulted other juveniles while incarcerated. (Report at 5). Ramdass' mother reported that Ramdass' father and her subsequent boyfriends were abusive to Ramdass and the records show that Ramdass lived in foster care for several months when his mother was unable to take care of him. (Report at 7).

The records further showed that Ramdass' background was extremely deprived, neglectful and abusive. Ramdass, however, defended his mother to Dr. Samenow and insisted that she worked hard and tried to take care of him. (Report at 8). Ramdass' mother reported that some of the places they lived were crime-ridden. (Report at 10). And Dr. Samenow concluded that Ramdass was intelligent, albeit uneducated. (Id.).

This report hardly supports a conclusion that Dr. Samenow was ***unqualified*** to evaluate Ramdass.[14] Ramdass chose not to put Dr. Samenow on the stand to testify because Dr. Samenow had concluded that Ramdass was dangerous. No controlling precedent then or now entitled Ramdass to the appointment of a different expert or of an expert who, despite the

[14] This Court denied Dwayne Wright's application for a stay of execution which also was based upon the claim that Dr. Samenow was unqualified under Ake. See Wright v. Angelone, 119 S.Ct. 370 (1998) (No. A-289).

overwhelming evidence to the contrary, would conclude that he was not dangerous. [15]

III. *Ramdass Is Not Entitled To A Stay Based Upon The Grant Of Certiorari In Williams v. Taylor.*

Ramdass briefly argues that this Court should "hold" his case for the decision in Terry Williams v. Taylor, No. 98-8384. In Williams, the Court will decide whether the Fourth Circuit's interpretation of the deference standard in § 2254 (d) was correct. As Ramdass candidly admits (Pet. Quest. 3), however, the Fourth Circuit's recitation of § 2254 (d) in his case represents an alternative holding.

For example, on the Simmons claim, the Fourth Circuit addressed the claim on its merits, found that Simmons did not apply because Ramdass was not ineligible for parole and then ***also*** held that a contrary ruling would run afoul of either § 2254 (d)'s "clearly established" provision or the "new rule" doctrine. Ramdass, 187 F.3d at 406-407. On the Ake claim, the Fourth Circuit held that the Virginia Supreme Court's rejection of the claim was not an unreasonable application of "clearly established federal law" under § 2254 (d) ***because the Ake claim itself had no merit***. Id. at 409. Thus, the Fourth Circuit's judgment does not ultimately rest upon its interpretation or application of § 2254 (d): the judgment rests upon a rejection of the merits of the claims themselves.

[15] No expert testified for either side on the issue of Ramdass' "future dangerousness" and, obviously, no expert opinion was needed. Ramdass' record was one of the worst in Virginia's recent history: he committed a purse-snatching from an elderly woman when he was fourteen. On probation from that offense, he began to sell drugs. Soon after, he stole a moped and broke into a house. He was paroled from that offense, reincarcerated and then escaped. At age seventeen, he robbed a man and was arrested in possession of a gun. Shortly after being paroled again, he obtained a gun and committed six armed robberies. Some of these robberies involved brutal physical violence, including the capital murder. See Ramdass, 437 S.E.2d at 574. Ramdass also was convicted of a second murder he committed in Alexandria in 1992, but that offense was not presented by the prosecution for consideration in the capital sentencing.

This Court should not grant certiorari or a stay of execution on the basis of another case that can have no effect upon the judgment of the Fourth Circuit in Ramdass' case. The Fourth Circuit's opinion clearly demonstrates that its judgment in Ramdass' case – to deny collateral relief – will remain exactly the same regardless of how this Court interprets § 2254 (d) in Williams. See generally Black v. Cutter Laboratories, 351 U.S. 293, 297-298 (1956) (this Court grants certiorari to review "judgments, not statements in opinions").

CONCLUSION

The petition for a writ of certiorari and application for stay of execution should be denied.

Respectfully submitted:

RONALD J. ANGELONE, DIRECTOR

By: Katherine P. Baldwin
Counsel

Mark L. Earley
Attorney General of Virginia

Katherine P. Baldwin
Assistant Attorney General
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IN THE

SUPREME COURT OF THE UNITED STATES

BOBBY LEE RAMDASS

Petitioner,

v.

RONALD J. ANGELONE,
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit
and on Application for a Stay of Execution

RESPONDENT'S APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 98-30 (L)

BOBBY LEE RAMDASS

Petitioner-Appellee,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellant.

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Office of the Attorney General

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

**PETITIONER-APPELLEE'S MOTION
TO SUPPLEMENT THE RECORD**

Petitioner-Appellee (hereafter "Mr. Ramdass") files this Motion to Supplement the Record pursuant to Rules 10(e) and 27 of the Federal Rules of Appellate Procedure and Fourth Circuit Local Rule 10(e). Specifically, Mr. Ramdass seeks to supplement the record by submitting the twelve-page document entitled "Report of Psychological Evaluation" prepared by Dr. Stanton E. Samenow

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on January 5, 1993 (hereafter "Report"). (A copy is attached hereto in the Addendum.) In support of this Motion, Mr. Ramdass states as follows:

1. If material is inadvertently omitted from the record, an appellate court has the power to supplement the record and consider the material in rendering its decision. See Fed. R. App. P. 10(e)(2); Fourth Cir. R. 10(e). This is true even if the material was never presented to the district court. See Fry v. Patseavouras, 974 F.2d 1330, 1992 WL 212146, at *3 n.3 (4th Cir. 1992) (unpublished opinion) (copy attached hereto in the Addendum); Liberatore v. Story, 854 F.2d 830, 833 n.2 (6th Cir. 1988); Ross v. Kemp, 785 F.2d 1467, 1474-75 (11th Cir. 1986); Gibson v. Blackburn, 744 F.2d 403, 405 n.3 (5th Cir. 1984). The record may be supplemented after briefing is underway. See Liberatore, 854 F.2d at 833 n.2 (stating that the motion to supplement was granted "[s]hortly before oral argument").

2. In a death penalty case, it is especially important that a federal appellate court review the case on a complete record. Dobbs v. Zant, 506 U.S. 357, 358 (1993). Indeed, federal appellate courts have unique powers in habeas corpus cases generally. See Ross, 785 F.2d at 1475.

3. A key factor in determining whether the record should be supplemented is the degree of relevance of the material to be added. See Dobbs,

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506 U.S. at 359. A second key factor is whether the "interests of justice" would be served by doing so. See Ross, 785 F.2d at 1475. Another factor is whether remand of the case to the district court for the purpose of supplementing the record would be contrary to the efficient use of judicial resources. Id.; Gibson, 744 F.2d at 405 n.3.

4. If a document was omitted from the record but was referred to in documents that were made part of the record, a federal appellate court may supplement the record by adding the underlying document. See Erkins v. Bryan, 663 F.2d 1048, 1052 n.1 (11th Cir. 1981) (motion to supplement unopposed by other party), cert. denied sub nom. United Steel Workers of America v. Erkins, 459 U.S. 989 (1982).

5. Mr. Ramdass seeks to supplement the record with the psychological Report prepared by Dr. Samenow on January 5, 1993. This Report was inadvertently omitted from the District Court record. However, the Report was reviewed by several witnesses whose affidavits were attached to Mr. Ramdass' Petition filed in the District Court. Specifically, the Report was reviewed by Leonard Piotrowski (Mr. Ramdass' trial counsel), Peter Greenspun (Mr. Ramdass' proffered expert on criminal trial practice), and Dr. Reuben Koller (Mr. Ramdass' proffered mental health expert). Mr. Piotrowski states in his affidavit that he

Resp. App. 3

received the Report and he discusses Dr. Samenow's views expressed therein. (Fourth Circuit Joint Appendix ["JA"] 445.) Dr. Koller states in his affidavit that he reviewed the Report. (JA 472.) He also discusses the Report and the shortcomings in Dr. Samenow's approach as reflected in the Report. (JA 474-75.)

6. Because Mr. Ramdass asserts that Dr. Samenow was wholly ineffective as a mental health expert and because Mr. Ramdass submits that his trial counsel were ineffective for not objecting to Dr. Samenow's appointment, Dr. Samenow's Report is unquestionably relevant to this habeas appeal. The Report is especially crucial on these issues because it was prepared by Dr. Samenow a mere three weeks before Mr. Ramdass' trial.

7. To remand this case to the District Court simply to admit the twelve page Report would not be an efficient use of judicial resources. The interests of justice would be served, however, if this Court were to consider the Report in assessing Mr. Ramdass' claims concerning Dr. Samenow.

8. Given the clear relevance and crucial nature of Dr. Samenow's Report, and given the inadvertence of its omission, Mr. Ramdass respectfully requests that this Court supplement the record by adding the Report to the materials to be considered in this case.

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9. Katherine P. Baldwin, counsel for Respondent-Appellant, has indicated that Respondent-Appellant will oppose this Motion to Supplement the Record.

Respectfully submitted,

BOBBY LEE RAMDASS

BY: _____

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Resp. App. 5

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 1999, a true copy of the foregoing pleading was mailed to:

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FILED: July 29, 1999

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-30(L)
(CA-96-831-2)

BOBBY LEE RAMDASS,

Petitioner - Appellee,

versus

RONALD J. ANGELONE, Director, Virginia Department of Corrections,

Respondent - Appellant.

ORDER

Appellee/cross-appellant has filed a motion to supplement the record pursuant to Rule 10(e) of the Federal Rules Of Appellate Procedure and this Court's Local Rule 10(e). Appellant/cross-appellee filed a response in opposition to the motion, and appellee/cross-appellant filed a reply in support of the motion. Appellee/cross-appellant has also filed an application for certificate of appealability for his cross-appeal, No. 98-32.

The Court denies appellee/cross-appellant's motion to supplement the record and grants appellee/cross-appellant's application for certificate of appealability in No. 98-32.

Resp. App. M

Entered at the direction of Judge Niemeyer with the concurrence of Judge Murnaghan and Judge Widener.

For the Court

/s/ Patricia S. Connor
Clerk

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F. NASH BILISOLY
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November 12, 1999

Ms. Cynthia Rapp, Clerk
United States Supreme Court
1 First St. NE
Washington, DC 20543

Re: *Bobby Lee Ramdass v. Ronald J. Angelone, Director of the Virginia Department of Corrections.*
Fourth Circuit C.A. No. 2:96cv831

Dear Ms. Rapp:

In conjunction with the Petition for Certiorari filed by Petitioner in this matter, enclosed please find a copy of a videotape transcript of the CBS news program *60 Minutes* on February 20, 1977 and the report of Psychological Evaluation prepared by Dr. Stanton E. Samenow, dated January 5, 1993 and for lodging with the Court.

Thanking you for your attention to this matter, I remain

Very truly yours,

F. Nash Bilisoly

FNB/ebi
Enclosures

cc: Katherine P. Baldwin, Esq.
w/o Enclosures

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